

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

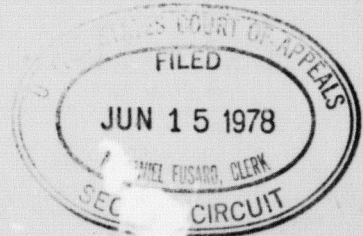


ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

776171...
BRIEF



TO BE ARGUED BY
JOHN M. O'CONNOR

June 15, 1978

Judges of the United States
Court of Appeals for the
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

B
PLS

Re: Edward Washington v. Secretary of
Health, Education and Welfare
Docket No. 77-6171 (2d Cir.)

Honorable Sirs:

This appeal involves a claim by plaintiff Edward Washington that he is not receiving the proper amount of money under the Federal Supplemental Security Income Program ("SSI"). In what is submitted is both a thorough and succinct "Report and Recommendation", the Honorable Kent T. Sincliar, United States Magistrate for the Southern District of New York, recommended that the determination of the Secretary with regard to the proper level of benefits was supported by substantial evidence and should be affirmed. The District Court (Tenney, J.) agreed and affirmed the Secretary's decision, granting defendant's motion for judgment on the pleadings. (Memorandum, dated September 27, 1977, attached).

June 15, 1978

Because the Magistrate's Report and the District Court Opinion cover all points that the defendant would brief, the defendant-appellee will rely on the same as its brief on appeal.

Based upon the reasoning of the Magistrate and the District Court, the judgment of the District Court should be affirmed.

Respectfully,

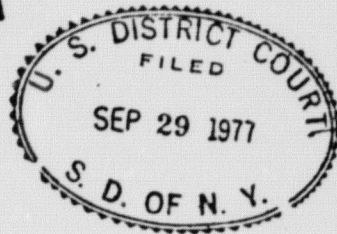
ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for the Defendant-Appellee,
Secretary of Health, Education and
Welfare

JOHN M. O'CONNOR,
Assistant United States Attorney

- Of Counsel -

Enclosures

COPY



75-2252
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EDWARD WASHINGTON, :

Plaintiff, :

75 Civ. 2480 (CHT)

-against- :

SECRETARY OF HEALTH, EDUCATION :
AND WELFARE, :

Defendant. :

46397
MEMORANDUM

APPEARANCES

Plaintiff, Pro Se: EDWARD WASHINGTON
857 Ninth Avenue, Apt. 1D
New York, N.Y. 10019

For the Defendant: ROBERT B. FISKE, JR.
United States Attorney for the
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One St. Andrew's Plaza
New York, N.Y. 10007

By: BARBARA S. SPIVAK
Assistant Regional Attorney
Office of the General Counsel
Department of Health, Education
and Welfare

JOHN M. O'CONNOR
Assistant United States Attorney,
Of Counsel

TENNEY, J.

The Secretary's motion for summary judgment in this
action was referred to United States Magistrate Kent Sinclair
to hear and report. By Report and Recommendation dated August

3, 1977, the Magistrate recommended affirmation of the findings and conclusions of the Secretary. Plaintiff Edward Washington submitted a timely objection to the Magistrate's Report, to which the Court must respond with a "de novo determination of those portions of the report . . . to which objection is made." 28 U.S.C. § 636(b). Having conducted a review of the record, the Court concludes that the motion for summary judgment should be granted and the findings and conclusions of the Secretary should be affirmed.

By this action plaintiff Washington seeks to have overturned the Secretary's determination that recoupment of money paid to Mr. Washington as a result of an overpayment which occurred when he failed to report the simultaneous receipt of Supplemental Security Income and Title II Social Security disability benefits was proper. Mr. Washington's sole objection seems to be that the Government must have known that he was receiving both types of benefits. The record clearly belies this contention, however, and shows instead that plaintiff was aware of the impropriety of allowing the unreduced receipt of both benefits but failed to make the Government aware of the duplication. Since the findings of the Secretary are "supported by substantial evidence," they must be regarded as conclusive. 42 U.S.C. § 405(g). Accordingly, summary judgment is granted, and the findings and conclusions of the Secretary are affirmed.

So ordered.

Dated: New York, New York

September 27, 1977

CHARLES H. TENNEY

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
EDWARD WASHINGTON :

Plaintiff, :

-against- :

SECRETARY OF HEALTH, EDUCATION :
AND WELFARE :

Defendant. :

REPORT AND RECOMMENDATION

75 Civ. 2480 (CHT)

-----x
SINCLAIR, Magistrate:

The present action was brought under Section 1631 (c) (3) and Section 205(g) of the Social Security Act, as amended [the "Act"], 42 U.S.C. Section 1383(c) (3) and Section 405(g), respectively, to review a final determination of the Secretary of Health, Education and Welfare [the "Secretary"] regarding the correct rate of payment to plaintiff Edward Washington under the program of Supplemental Security Income ["SSI"].

I BACKGROUND

Plaintiff was a recipient of aid under New York State's plan of aid to the aged, blind and disabled. In December, 1973, pursuant to 42 U.S.C. § 1382(c) (3) (E), he was converted from the State program to the Federal SSI program, as a disabled individual. Plaintiff was, in effect, guaranteed as a "grandfathered" individual that the change to the federal SSI program would not reduce the amount he would otherwise have received from the State. Through State supplementation of the flat SSI grant an eligible individual would receive the amount to which he was entitled from the State in December, 1973. Mr. Washington received \$288.00 per month from the State in December, 1973, which was the amount calculated by the New York State Department of Social Service as being

required to meet plaintiff's budgeted needs (Tr. 32).

Plaintiff was notified that he was eligible under the SSI program and that his total grant amount was \$288.00 (Tr. 46). Plaintiff began to receive a monthly check from SSI in that amount. In early 1974, the Social Security Administration became aware that as of December of 1973, plaintiff was receiving, in addition to his State grant of \$288.00, a federal Title II Social Security disability benefit payment of \$172.70 per month. The State welfare center, which had been administering Mr. Washington's State benefits, was contacted and confirmed that the existence of the Title II income had not been known and had not been taken into account in determining plaintiff's December, 1973, grant amount. (Tr. 32, 33). Furthermore, if the State welfare center had known that Mr. Washington was receiving Title II benefits, they would have deducted the amount of the Title II benefit from the grant amount.*

In December of 1973, Mr. Washington's Title II disability benefit income was \$172.70. The applicable income disregard was \$7.50. (New York State Department of Social Services Regulation No. 352.18). Mr. Washington was also entitled to an additional income disregard of \$4.00 (Tr. 39, 40) and his total disregarded income would

* In conformance with New York State Department of Social Services Regulation No. 352.16 (Tr. 16), Mr. Washington's budgeted total needs under the State program were calculated to be \$288.00 monthly (\$144.00--bimonthly, Tr. 32). The State program provided the difference between plaintiff's budgeted needs and his income. Mr. Washington would receive the full amount of his computed needs from the State only if he had no other source of income to meet those needs. If plaintiff had a source of income, the amount of that income (minus a certain amount which is disregarded) would be set-off against his budgeted needs and the State would make up the difference between plaintiff's income and needs.

be \$11.50. Plaintiff's income for the State grant purposes in December, 1973 was, therefore, \$161.20 (the \$172.70 Title II benefit less \$11.50). Therefore, plaintiff was, in fact, eligible to receive monthly from the State the difference between his budgeted needs of \$288.00 and his recognized income of \$161.20, or a total of only \$126.80. Since the State did not know of plaintiff's income, it erroneously paid him the full amount of his budgeted needs, \$288.00 monthly.

After receiving notification of the Secretary's determination regarding his proper SSI benefit rate, plaintiff requested a reconsideration (Tr. 29). Upon reconsideration by the Department of Health, Education and Welfare, the determination regarding his proper rate under SSI was affirmed (Tr. 28) (\$288.00 per month). Plaintiff requested a hearing (Tr. 17), which was held (Tr. 18-27). The hearing examiner reached the same determination of Mr. Washington's correct SSI rate (Tr. 11) (\$288.00 per month). It was determined that plaintiff had been overpaid and that, since plaintiff was not without fault in incurring the overpayment, the amount of overpayment should be recouped. The Appeals Council affirmed the hearing examiner's decision (Tr. 2).

II DISCUSSION

On review by this Court, "the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive...." 42 U.S.C. § 405(g). Richardson v. Perales, 402 U.S. 389 (1971); Cutler v. Weinberger, 516 F.2d 1282 (2d Cir. 1975); Franklin v. Secretary, 393 F.2d 640 (2d Cir. 1968).

Mr. Washington's contention, on the motion of the government for judgment on the pleadings, was that he should receive the full \$288.00 per month in addition to the full

amount of his Title II disability benefits. As a basis for reversal of the Secretary's decision, Mr. Washington alleged that since the New York State Social Services Department had sent him to the Social Security Administration to seek Title II disability benefits, the State should have known of his receipt of these benefits.

Plaintiff was entitled after conversion to the federal SSI program to "the amount of income received by such individual in December, 1973, minus any such income which did not result, but which if properly reported would have resulted in a reduction in the amount of such aid or assistance." P.L. 93-66 Section 212(a)(3)(B)(ii).

The record amply demonstrates that since Mr. Washington did not report his Title II disability benefits, they were not included in the calculation of his December, 1973 state benefits. As a result, during December of 1973, plaintiff received both \$288.00 from the New York State Department of Social Service under the State plan of aid to the Aged, Blind and Disabled, and \$172.70 in Title II disability benefits, resulting in an overpayment. The record also fully supports the Secretary's determination that the State Welfare center which computed Mr. Washington's budgeted needs (Tr. 32) as \$288.00 per month was unaware of his additional income when they determined his State allotment (Tr. 34). Had the State Welfare center known of plaintiff's Title II benefits, the deduction of this amount, minus any applicable income disregard, would have been required.

Plaintiff Washington's allegation that since the State Welfare center sent him to a doctor, they knew of his receipt of Title II benefits is directly contradicted by the budget prepared for Mr. Washington and contained in the administrative record (Tr. 31) and the subsequent verification procedures of the Secretary. That Mr. Washington was

notified that his State grant required deduction of other income from his budgeted needs is apparent from the State Fair Hearing decision which plaintiff himself submitted for the present record (Tr. 30-31). In addition to determining that his budgeted needs were calculated at \$238.00 per month (Tr. 32), the Fair Hearing decision refers to a regulation providing "that when a grant has not been reduced in a month when there is an increase in income an adjustment may be made to offset the excess...." N.Y. State Department of Social Services Regulation No. 352-31(d).

Thus, there is this substantial evidence to support the Secretary's conclusion that plaintiff was not without fault in causing the overpayment through his "[f]ailure to furnish information which (he) knew or should have known was material." 20 C.F.R. 416.552(a) (40 F.R. 47764, October 10, 1975).

The Act, in pertinent part, provides that: "Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall...be made..." Section 1631(b) of the Act, 42 U.S.C. Section 1383(b). In computing an overpayment "the amount of an overpayment is the difference between the amount paid to a recipient for a period and the amount of payments for which such recipient actually was eligible for such period." 20 C.F.R. 416.438(a), 40 F.R. 47763, October 10, 1975. A review of plaintiff's payment record demonstrates that the amount recouped by the Secretary was in conformity with

these rules.*

Accordingly, the findings and conclusions of the Secretary are supported by substantial evidence and should be affirmed. The motion for judgment on the pleadings should, therefore, be granted.

Pursuant to 28 U.S.C. § 636, as amended, the parties shall have until August 19, 1977 to file objections to the foregoing Report and Recommendation, addressed to the Honorable Charles H. Tenney. Copies of such objection should be filed with the Clerk of the Court and extra copies delivered to the Chambers of Judge Tenney, Room 1904, and the Chambers of the Undersigned, Room 427.

DATED: New York, New York
August 3, 1977

KENT SINCLAIR, JR.
UNITED STATES MAGISTRATE

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- * Plaintiff's checks for the period March to August, 1974 (Tr. 36) reveal a reduction in the \$288.00 monthly entitlement in a total amount of \$300.40. The overpayment to Mr. Washington had been \$300.40 (Tr. 12). Although plaintiff Washington did not raise the issue, due process ordinarily requires the opportunity for a recipient of aid to be heard in connection with any reduction of benefits. Lyons v. Weinberger, 376 F. Supp. 248, 262 (S.D.N.Y. 1974). However, a hearing is not constitutionally compelled in all cases. Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976); White v. Matthews, No. 77-6015, slip op. at 4727 (2d Cir. July 18, 1977). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it.... He must, instead have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Here plaintiff Washington was never entitled to receive both the full State grant and Title II benefits. Hence, "[t]he Fourteenth Amendment's procedural protection of property" Board of Regents v. Roth, supra at 576, was not violated by the pre-hearing recoupment procedures used by the Secretary herein. Moreover, plaintiff was subsequently accorded a plenary administrative hearing prior to the final determination by the Secretary.